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SANDS' ADMINISTRATOR AND OTHERS v. DURHAM.*

Supreme Court of Appeals: At Wytheville.

June 28, 1900.

Absent, *Riely, J.*

1. SUBROGATION — *Doctrine — Principal and surety—Co-obligors—Partners—Joint contractors.* Subrogation is the equity by which one who is secondarily liable for a debt, and has paid it, is substituted to all the securities and remedies of the creditor in order to enforce exoneration from the principal debtor and save harmless the party paying. To entitle a party to subrogation his equity must be strong and his case clear. The principle applies to every instance (except in the case of a mere stranger) where one man has paid a debt for which another is primarily liable. The right will not, however, exist between parties who are equally bound, as for example co-partners, co-obligors and co-contractors, except by virtue of a special contract.
2. PARTNERS—*Subrogation—Contribution—Sec. 2855 of Code.* A partner who has paid a partnership debt out of his private means may, upon a settlement of the partnership accounts, have contribution from the other partners of their due proportion of the debt so paid, but he is not entitled, in the absence of an agreement to that effect, to be subrogated to the rights of partnership creditors whose debts he has paid. This rule is not affected by section 2855 of the Code making partners jointly and severally liable for partnership debts.
3. PARTNERS—*Contribution—Subrogation—Special contracts—Sureties.* While the right of contribution exists amongst partners, the doctrine of subrogation does not ordinarily apply, as there is no obligation to pay a partnership debt resting on one superior to that which rests upon another, but if it be agreed amongst the partners themselves that one of them shall occupy the relation of surety to the other equity will respect the agreement, and apply the doctrine of subrogation in favor of him whom it has been agreed shall be a surety only.
4. JUDGMENTS—*Payment by partner—Subrogation—Alienees—Notice.* A judgment against the members of a partnership for a firm debt, which has been paid off by one of the partners, will not be enforced for his benefit against an alienee of another member of the firm, although such alienee had actual notice of the judgment, in the absence of any other right in the party paying than that he was a member of the partnership and paid the firm debt out of his private means.

Appeal from a decree of the Circuit Court of Giles county, pronounced at its May term, 1899, in a suit in chancery, wherein the appellee was the complainant, and the appellants were the defendants.

Reversed.

The opinion states the case.

*Reported by M. P. Burks, State Reporter.

Wysor & Gardner, for the appellants.

W. J. Henson and *S. W. Williams*, for the appellee.

CARDWELL, J., delivered the opinion of the court.

In the year 1886 John H. Durham, D. L. Whittaker, and D. A. Earley formed a partnership for conducting a mercantile business in Giles county, under the style and firm name of D. L. Whittaker & Co. Whittaker furnished the capital of a stock of goods amounting to \$3,000, which he was to get back out of the concern, and they were to be equal partners, dividing equally the profits and losses. The firm, after doing an unsuccessful business, dissolved in October, 1897, by selling out their stock of goods to one G. L. Bane. Judgments had been obtained against the firm, which were unpaid, and many outstanding claims not in judgment were also against the firm. The accounts, notes, etc., were turned over to J. H. Durham for collection. He collected all he could and applied the collections to the firm debts, and the residue of the judgments against the firm he paid out of his own means. These judgments were duly docketed on the lien docket of Giles County Court, and were not marked satisfied. Durham brought this suit in October, 1895, for a settlement of the partnership accounts, and not only to have contribution from his partners, Whittaker and Early, but to be subrogated to the lien of the judgments which he had paid out of his private means, to the extent his partners might fall in arrears to him on settlement, and to subject the lands owned by Early at the time of the rendition and docketing of the judgments against the firm, to the extent that Early might be indebted to him on the settlement. Early and wife having on the 5th of March, 1890, sold and conveyed to Mrs. Ann J. Sands three small tracts of land in Giles county, five-eighths of which belonged to Early and the remaining three-eighths to his wife, complainant claimed the right by subrogation to subject the five-eighths interest in those lands, formerly owned by Early, to the payment of one-half of the judgments against the firm discharged by complainant out of his private means, amounting to \$4,574.87, the other partner, Whittaker, being insolvent.

The Circuit Court decreed that Durham was entitled by subrogation to the rights of the judgment creditors whose judgments he had paid off, and subjected not only the property owned by Early at the time of his death, but the five-eighths interest in the land which he had conveyed to Mrs. Sands in March, 1890, to the payment of one-half of

the judgments paid by Durham. From this decree the administrator and heirs of Mrs. Sands, who had died, obtained an appeal to this Court.

It is well settled that one partner who has paid out of his own means debts of a partnership of which he is a member, may upon a settlement of the partnership accounts have contribution from the other partners of their due proportion of the debts so paid. It is also well settled, that where one in the situation of surety pays the debt of him who is primarily liable, equity will put him in the place of the creditor whose debt he has discharged and give him the benefit of the securities which the creditor has obtained from the principal debtor; and though no assignment is actually made, equity treats it as having been done. *Grubbs v. Wysor*, 32 Gratt. 129.

Subrogation is the equity by which a person who is secondarily liable for a debt, and has paid the same, is put in the place of the creditor so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor in the same rank with himself. To entitle a party to subrogation his equity must be strong and his case clear. It is an equity called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to read the benefit of any securities which the creditor may hold against the principal debtor and by the use of which the party paying may then be made whole. Bispham's Principles of Equity, 393. But says this learned author, p. 396: "The principle of subrogation is a general one and will apply to every instance (except in the case of a mere stranger), where one man has paid a debt for which another is primarily liable. The right will not, however, exist between parties who are equally bound—as for example, co-partners, co-obligors and co-contractors, except, of course, by virtue of a special contract. Such special contract may exist, for example, where an outgoing partner takes a covenant from the remaining members of the firm to pay the partnership debts and save him harmless. He stands, under these circumstances, in the position of a surety, and may be subrogated to the remedies of the creditor if the covenant be not fulfilled."

A partner who retires from the firm, and, for a valuable consideration, is indemnified by the remaining partners against all debts and liabilities of the firm, will in equity be considered a surety for them and subrogated to the rights of the creditor to whom he has been compelled to pay a firm debt. 24 Am. & Eng. Enc. L. 237. Among

the authorities cited in support of this text is the case of *Buchanan v. Clark*, 10 Gratt. 164.

In that case G, B and K were principal obligors in a bond. B and K put money in the hands of G to pay the bond; and he bound himself to pay it, but failed to do so, and became insolvent. A judgment was recovered on the bond against the three, and B paid it. After the judgment G conveyed his land to S to secure a debt due to him and another debt due to C. Upon a bill by B and K against S and C to subject the land conveyed in the deed to S to satisfy the debt B had paid, the court held that it was competent for G, B and K to contract that, as between themselves, G should be the principal and B and K his sureties, and that this had been done; that as between B, K and G, the former were entitled to be subrogated to the lien of the judgment creditor upon the land; and that they were equally entitled as against purchasers from G, who did not show a better equity. The opinion of the court recognizes that partners ordinarily do not have the right of subrogation to the rights the firm's creditor holding a security for a debt of the firm paid by one of the partners out of his own means, and puts its adjudication in that case, whereby B and K were subrogated to the rights of the judgment creditor, whose judgment they paid, solely upon the ground that B and K and G had contracted that as between themselves, G should be the principal and B and K his sureties in the debt, for the opinion says: "As between the partners and the creditor, they were all equally bound, and no understanding and agreement between themselves could change that relation so as to impair his right. But there was nothing in that relation which would prevent the partners, as between themselves, from assuming the relation of principal and securities."

The ground upon which some of the adjudicated cases hold that a partner of a losing concern, paying a debt of a lien creditor of the firm, cannot have subrogation to the rights of the creditor, is, that payment by a co-principal extinguishes the debt and leaves no right of subrogation. It is more accurately stated by Strong, J., in the well considered case of *McCormick v. Irwin*, 35 Pa. St. Repts. 111, thus: "The reason why subrogation is not allowed to one partner as against his co-partner, or to one merely a joint debtor, as against his co-debtor, is because as between them, there is no obligation to pay the debt resting upon one, superior to that which rests upon the other." See also *Dering v. Earl of Winchelsea*, vol. 1, part 1, Leading Cases in Equity, 148; and Sheldon on Subrogation, secs. 170, 171.

Counsel for appellee contends that the rule is changed by the statute, sec. 2805, passed in 1849, whereby partnership debts are now joint and several, and also cites *Morris v. Morris*, 4 Gratt. 293 in support of the further contention that because the partnership debts are now joint and several, one partner who pays off the creditor's debt with his own private means is entitled to be subrogated to the creditor's right. That case only held that a surviving partner having paid the partnership debts of a losing concern, is entitled to be substituted for the amount that the estate of the deceased is indebted to him on that account, to the rights of the creditors of the firm whose debts he has paid; that is, the surviving partner paying the debts is entitled to share in the separate estate of the deceased partner. But this, as was said by Sheldon in his work on Subrogation, sec. 171, *supra*, is upon the ground that by virtue of the partnership agreement to contribute to losses the partner paying a firm debt out of his private property may in equity enforce contribution from his co-partner, rather than by way of subrogation. In other words, the doctrine of subrogation does not ordinarily apply as between co-partners, though the right exists to have contribution from each other, where one has paid out of his private means a debt of the firm, which is not repaid to him out of the social assets. To entitle a partner, paying out of his private means debts against the firm, to be subrogated to the rights of the creditors whose debts he has so paid, the relations ordinarily existing between co-partners must have been changed by an agreement between them whereby they assumed the relation of principal and surety. *Buchanan v. Clark*, and other authorities, *supra*. There was no such agreement in the case at bar, and appellee was, therefore, not entitled to be subrogated to the rights of the judgment creditors whose judgments against the firm of D. L. Whitaker & Co. he paid.

Much stress is laid by counsel for appellee upon the constructive notice to Mrs. Sands of the rendition and docketing of these judgments, and the actual notice she is claimed to have had when she bought the land from Early; but, leaving out of view the testimony going to show that she was misled by the statements made by appellee to her agent, Hall, who purchased the land for her, and conceding that she had both constructive and actual notice of the judgments at the time of the purchase, it does not alter the case, for she may have actually known of the existence of the judgments on the docket, yet she also knew that they were judgments against the partnership of D. L. Whitaker & Co.; that each member of the firm was primarily bound

for their payment, and that appellee was solvent. The only risk she ran in taking a conveyance of Early's portion of the land from Early and wife was that the judgments would not be paid by the firm or either of the partners, and could not be made out of either of them. They, however, having been paid by appellant, without a special contract or agreement changing the relations ordinarily existing between co-partners, whereby he became surety for the other partners, are no longer enforceable on the lands aliened by Early to Mrs. Sands. Therefore, the decree appealed from, in so far as it holds the contrary, is erroneous, and will be reversed and annulled, and the cause remanded to the Circuit Court for such further proceedings therein as may appear proper in accordance with the views expressed in this opinion. *Reversed.*

NOTE.—The single point decided in this case is that subrogation does not exist as between partners, where one, after dissolution, discharges a judgment against the firm, out of his own funds.

In this ruling we think the court has been misled by Mr. Bispham's statement, which is quoted and followed.

Mr. Bispham does not confine the principle to partners—but his statement is that the right of subrogation does not exist "between parties *equally bound*, as for example, co-partners, co-obligors, and co-contractors," except by virtue of a special contract. Bispham's Equity (5th ed.), sec. 337. The authorities cited in support are two Pennsylvania cases and one English case, viz: *Baily v. Brownfield*, 20 Pa. 41; *Fessler v. Hickernell*, 82 Pa. 150; *Oakley v. Pasheller*, 10 Bligh (N. S.) 548.

As the doctrine of subrogation has been extended in America far beyond any application of it by the English courts, we may dismiss from consideration any English authority in this connection. Mr. Bispham himself points out, in the section preceding that just cited, the difference between the restricted application of the doctrine by the English courts and the liberal views entertained and enforced on that subject by the courts of this country. As an example of this, the author cites the case of *Copis v. Middleton*, 1 T. & R. 229, in which it was held by Lord Eldon, followed later by Lord Brougham in *Hodgson v. Shaw*, 3 My. & K. 190, that a surety who satisfies a judgment against himself and his principal is not entitled to be subrogated to the rights of the creditor, and to have the judgment kept alive for his benefit. Such a doctrine shocks the conscience of an American lawyer—and must have disturbed that of the English bar, as the right of subrogation in such case was subsequently extended to the surety by Act of Parliament. 19 & 20 Vict., c. 97. The doctrine of *Copis v. Middleton* was expressly repudiated by the Virginia court in *Powell v. White*, 11 Leigh, 309.

As to the Pennsylvania cases cited by Mr. Bispham, in the first (*Baily v. Brownfield*) subrogation was properly denied to one partner as against the other on the ground that the *partnership accounts had not been settled*, and it could not therefore appear whether one partner had paid more than his share or not. The

court does say, however, *obiter*, that one partner, after paying a partnership debt, cannot be substituted to the rights of the creditor as against his copartner—doubtless a correct statement of the law so long as there are partnership assets or unsettled partnership accounts. In the other case relied upon by Mr. Bispham (*Fessler v. Hickernell*), subrogation was denied to one partner as against the other on the express ground that *until the partnership accounts were settled* there was no way of ascertaining whether any, and if any what, balance was due to the partner seeking subrogation. The court distinctly recognizes the right of the partner who has paid more than his share to claim the benefit of subrogation, provided that, upon a settlement of the partnership accounts, a balance appears to be due him. Says Paxson, J: "Where one partner has paid a partnership debt he is not entitled to subrogation until an account has been settled between them. In what other way can it be ascertained which is the creditor and which is the debtor partner? . . . How can it be ascertained upon the execution how much of the debt Bomberger [the defendant partner] ought to pay? Clearly this cannot be done without a settlement of the partnership accounts. It may be that upon such settlement it will be found that Hickernell [the plaintiff partner] ought to pay the whole of the judgment." Along with the report of this case is presented a brief *résumé* of the argument of counsel, from which it appears to have been conceded, in the light of numerous Pennsylvania cases cited, that the right of subrogation would exist but for the unsettled condition of the accounts.

It appears, therefore, that Mr. Bispham's authorities are far from sustaining his text.

In the still later Pennsylvania case of *Ackerman's Appeal*, 106 Pa. St. 1, the right of one of two principal debtors (not partners) to subrogation against his co-debtor, on a joint judgment against both, was expressly upheld, Mr. Justice Paxson again delivering the opinion. "The learned judge" [below], says the court, "refused the subrogation upon the ground that Ackerman and Moser were both principal debtors. This was so as between them and the plaintiff in the judgment. But as between themselves, Ackerman was surety for Moser, and paid his share of the joint liability. . . . As between Ackerman and Moser, Ackerman was security for Moser's share, and having been compelled to pay it, is entitled to the benefit of the judgment to that extent." It is evident, therefore, that Mr. Bispham's proposition that the right of subrogation does not exist "between parties equally bound, for example co-partners, co-obligors, and co-contractors," does not express the law of his own State of Pennsylvania.

It is equally demonstrable that it does not express the law of Virginia, or that generally prevailing in America.

The doctrine of subrogation is one of the most beneficent in the whole range of equitable jurisprudence. It is not a technical principle, nor does it in any wise rest in contract. It is one of the benevolences of the law, created and enforced solely in the interest of justice. As was well said in *Acer v. Hotchkiss*, 97 N. Y. 395, it is "a device to promote justice. We shall never handle it unwisely if that purpose controls the effort, and the resultant equity is kept steadily in view." It is not invoked solely for the benefit of those who stand in the technical relation of sureties. Where one is compelled to pay a debt, or part of a debt, for which another is, as between the two, primarily liable, then the person so discharging the liability is subrogated to all the remedies and securities to which the

satisfied creditor was entitled. This principle has been so frequently announced and so constantly applied in Virginia, and by the present court, that the citation of authority is needless. In no State of the Union has this beneficent principle been fostered with more zeal or enforced with more wisdom and liberality than in Virginia. The fine saying of Judge Carr, in *Enders v. Brune*, 4 Rand. 447, has been accepted by the Virginia courts as expressing the spirit which should guide them in enforcing this right, namely: "It has nothing of form, nothing of technicality about it; and he who in administering it would stick in the letter, forgets the end of its creation and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object."

As stated by Mr. Justice Paxson, in *Ackerman's Appeal*, already quoted from, it is a settled principle of law that while, as between *principal debtors*, both are equally bound to the creditor, yet, as between themselves, each is a surety for the other with respect to that portion of the debt due by his fellow. Even as between the creditor on the one hand, and the *principal and surety* on the other, the latter are both equally bound. The surety is as much bound as the principal—and primarily bound. The surety who binds himself as a co-debtor with his principal, occupies the position of a principal debtor, equally bound with the principal, so far as concerns his obligation to discharge the liability to the creditor. There is no difference in this respect between two principal debtors and two joint debtors of whom one is a surety. If the principle of subrogation applies not to parties "equally bound" when both are *principals*, it must be likewise inapplicable when "equally bound" as *principal and surety* respectively. But we know that the right does exist on behalf of the surety in the latter case. If one principal co-debtor, though equally bound to the creditor, is but a surety for his fellow's portion of the obligation, as no one denies, then the right must exist in the latter case also.

Where the principal is insolvent, and one surety pays the debt, no court denies his right of subrogation as against his co-surety—and yet here both are "equally bound," and both are practically principal debtors by virtue of the elimination of the original principal by insolvency or bankruptcy. This phase of the question was strikingly exemplified in the well-known case of *Pace v. Pace*, 95 Va. 792, where one co-surety was held entitled to subrogation against the other, though equally bound with him.

In the latter case this right of subrogation between two co-sureties was, among other reasons, justified on the ground that it took away the temptation on the part of one co-debtor to evade payment until the creditor should realize as much as possible from the other. "Results like these," said Harrison, J., "which depend not upon the rights of the parties fixed by law, but upon the superior skill of one over the other in manœuvering for position, or upon the will and caprice of the creditor, or upon mere accident, cannot be founded upon sound principles." Applying this apt reasoning to the facts in the principal case, a different result should have been reached, since the rule established in the latter case encourages either partner not to pay voluntarily, but to manœuver for position and to evade payment as long as possible, in the hope that the creditor will in the meanwhile realize the co-partner's proportion of the joint debt. If by accidental circumstances, or by the caprice of the creditor, or by arrangement with one partner, the creditor had seen fit to enforce his judgment lien against *both* partners in a chan-

cery suit, it is clear that the court, under the principles of *Horton v. Bond*, 28 Gratt. 815, would have taken notice of the equities of the partners *inter sese*, and would have subjected the property of each in such proportion as the state of the accounts between them showed to be just. Is the partner who came forward and paid the whole of the debt, without evasion, and without awaiting pressure from the joint creditor, to suffer by reason of his promptness and integrity? Every principle of equity demands a negative answer.

So that, on principle, the right of subrogation ought to exist "between parties equally bound, as for example, co-partners, co-obligors and co-contractors." To say that it does not exist *because* such parties are "equally bound" is a *non sequitur*. Such a reason is scarcely less satisfactory than the denial of the right in a particular case because both parties are of the same age or height.

Nor is it at all satisfactory to say that the parties being equally bound, payment by one extinguishes the entire security. This begs the question, since whether payment should be held to be an extinguishment is the point at issue. This was the unavailing argument made in *Pace v. Pace* (*supra*). While payment by one co-debtor extinguishes the security at law, equity keeps it alive for the benefit of the debtor so paying.

We conclude this already too voluminous note with a glance at the authorities outside of Pennsylvania.

In *Tompkins v. Mitchell*, 2 Rand. 428, the right of subrogation was enforced in favor of one principal debtor against his co-debtor, where the former had paid more than his proportion of the debt, by substituting him in the place of the creditor whose vendor's lien the plaintiff had discharged—the court saying that as between themselves each was a principal debtor for one-half of the debt and a surety for the residue.

In *Wheatley v. Culhoun*, 12 Leigh, 264, 273–274, precisely the same principle was applied, and on the same ground. Here, the parties were partners, and though the original debt was a joint but not a partnership debt, the firm subsequently executed its notes therefor, secured by a lien on the property for which the debt was created. One of the partners discharged the whole, and was held (opinion by Tucker, P.) entitled to be subrogated to the lien of the creditor whom he had satisfied.

In *Dobyns v. Rawley*, 76 Va. 537, it was held (opinion by Burks, J.) that where two persons jointly purchased real estate, executing joint bonds secured by a vendor's lien, one who paid more than his share was entitled to be subrogated to the lien, to the extent of the surplus so paid. True, there was an agreement in this case between the debtors that they should pay in unequal proportions (\$2400 and \$2600, respectively), but this was not material to the result, since the express agreement for unequal payments merely substituted the implied agreement which the law would otherwise have annexed, that they should bear the burden equally.

We think the court in the principal case is in error in the statement that the opinion in the case of *Buchanan v. Clark*, 10 Gratt. 164, "recognizes that partners ordinarily do not have the right of subrogation to the rights of the firm's creditors holding a security for a debt of the firm, paid by one of the partners out of his own means." In that case one of three partners had been furnished with money of the firm with which to pay, and had agreed to pay, the *whole debt*. He

failed to do this, and the creditor having obtained a judgment against all three partners, it was discharged by the other two. These filed a bill seeking to be subrogated to the lien of the judgment for the *whole amount* against the delinquent partner. The agreement mentioned, by which the latter assumed payment of the whole, was manifestly material, and, indeed, essential to the relief sought. And, accordingly, the court granted the relief, on the ground of this stipulation between the partners. But we find nothing in the opinion which intimates that the right of subrogation does not exist as among partners, in the absence of any special agreement.

The court in the principal case cites Sheldon on Subrogation, 170, 171, as authority for the proposition that the right of subrogation does not exist between co-debtors and co-partners. The citation, so far from sustaining the proposition, is directly opposed. The author's statement in sec. 169 is that "one of several joint debtors will, as against his co-debtors, ordinarily be subrogated to the securities and means of payment of the common creditor, whom he has satisfied. . . . Each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay, and as a surety for his co-debtors as to that part of the debt which ought to be discharged by them." The principle is then illustrated by numerous examples. In sec. 171 the author is equally emphatic in assigning to partners the same right. "A partner," says the author, "who, after dissolution of the partnership, pays a firm debt out of his private property, may in equity enforce contribution therefor from his copartners. . . . The right of one partner who has paid a firm debt to be substituted to the position of the creditor as against his copartners cannot ordinarily be enforced without a settlement of the partnership accounts. . . . And the representatives of a deceased partner who have paid the whole of a partnership debt, may be substituted to the place of the creditor, in order to recover a contribution from the surviving partner or his estate."

In 24 Am. & Eng. Enc. Law, 234, the same doctrine is announced, with a wealth of authority cited in support. To the same effect is Merwin's Eq., sec. 629, and 2 Pomeroy's Eq. Jurisp. (2d ed.) 1419 (n.).

In *Dowdy v. Blake*, 50 Ark. 205, 7 Am. St. Rep. 88, the statement of Mr. Bishop is quoted, examined and disapproved as not sustained by American authority.

Nowhere do we find any distinction made in this respect between copartners and other joint debtors, and on principle no such distinction exists. Nor do we find any express authority for the statement of Mr. Bispham, or the view taken in the principal case, save in a few of the States where the English doctrine prevails, that payment of a security by one co-debtor, whether principal or surety, extinguishes it, unless an assignment be taken—a doctrine which was thoroughly examined and expressly repudiated in *Powell v. White*, 11 Leigh, 309.

In the principal case, the partner who had paid the whole amount of the judgment, asked in his bill that the partnership accounts be settled, and that he be subrogated to the lien of the judgment against his co-partner for any balance appearing from such settlement to be due him. It is submitted, with deference, that the court erred in denying him this right.